FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1217

VIRGINIA DARE TRANSPORTATION CO., INC.,
Petitioner and Appellee below

vs.

NORFOLK SOUTHERN BUS CORPORATION,
Respondent and Appellant below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

~~*Respondent and Appellant below*~~
W. R. ASHBURN,
Norfolk, Virginia;

J. C. B. EHRINGHAUS,
Raleigh, North Carolina;
Counsel for Petitioner

COMMERCIAL PTG. CO., RALEIGH

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CASES

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Appellee below, respectfully shows:

Statement of the Matter Involved

This is an action between two bus companies. It grows out of an arrangement memorialized by two writings, (1) Defendant's Exhibit 4 at first trial, (mistrial), Exhibit 8 at last trial, a copy of which, for convenience of reference, is attached to the Brief supporting this Petition, and (2) Defendant's Exhibit 2, pages 6-9 of Appellant's Brief in Circuit Court of Appeals and pages 210-215 of Appendix thereto. Except

where otherwise stated page references are to Appendix to Appellant's Brief.

Under the first of these, Virginia Dare gave up to Norfolk Southern its terminals in Elizabeth City and Norfolk, surrendered and released its right to the payment of Fourteen Thousand Dollars ($14,000.00) by Norfolk Southern for compliance with a previous contract and option and other rights thereunder (including a terminal at Sligo) and conveyed to Norfolk Southern the so-called Habit franchise between Norfolk, Elizabeth City and extending far beyond through Edenton, Plymouth, Washington, etc. Under the second of these writings, which is the subject of this action, Norfolk Southern agreed to furnish, in lieu of those rights and properties surrendered, etc., terminals, pick-up and delivery service to Virginia Dare at Norfolk and Elizabeth City without further charge for as many as two round trips a week and the agreement that Virginia Dare was to pay a stipulated amount for service for any additional trips, that is, trips in excess of two round trips a week. There is not one word in this contract limiting Virginia Dare to two or to any other number of trips or schedules.

These papers were all drawn by Norfolk Southern officials or attorneys (p. 42-43), were sent to Virginia Dare in the same envelope for signature and returned and were received and executed as a part of one and the same transaction. (P. 52 and 53) (Appendix to Appellant's Brief, page 42-53, inclusive). Furthermore as will appear by reference to said pages, they were signed and returned exactly as prepared and forwarded to Virginia Dare for signature and without slightest change in either of them. (Page 41)

Under this arrangement, of course, Norfolk Southern received immediately the consideration which passed to it under the two-writing arrangement; namely, the Habit franchise, the two terminals which Virginia Dare had been using up to that time, and release from its obligations under the previous

contract. Since at that time Norfolk Southern had no franchise between Norfolk and Elizabeth City, and since the extension of the Habit franchise beyond Edenton paralleled the Norfolk Southern Railroad this franchise was very valuable to Norfolk Southern. Norfolk Southern is still in possession and enjoyment of this franchise and all the other rights and privileges surrendered to it by Virginia Dare.

On the other hand, except for the cash consideration, which was paid to Virginia Dare in large part by Habit Brothers in settlement of the law suit then pending, and only about Sixteen Hundred Dollars ($1,600.00) of which was paid by Norfolk Southern, the principal value passing to Virginia Dare was the arrangement for terminal, pick-up and delivery services at Norfolk and Elizabeth City, which were largely prospective and covered a period of years ahead.

After the parties had acted under this arrangement for approximately four and one-half years without slightest question of its validity, Norfolk Southern suddenly raised question of the validity of the arrangement providing terminal. pick-up and delivery services to Virginia Dare. However, Norfolk Southern continued and still continues to enjoy the Habit franchise and the other rights and immunities which it received under the arrangement while challenging those which represent practically the only compensation, or certainly the bulk of the compensation, passing to Virginia Dare for its conveyances and surrenders under the arrangement represented by the two writings.

The Norfolk Southern instituted this action in the District Court of the United States for the Eastern District of Virginia, for recovery, as upon quantum meruit, of the value of the terminal, pick-up and delivery services furnished to Petitioner (Virginia Dare) at the terminals in Norfolk, Virginia, and Elizabeth City, North Carolina, over the period of approximately four and one half years, during

which they had been operating under these contracts. Virginia Dare denied the right of Norfolk Southern to recover, insisting that the services had been furnished under the written contract (Defendant's Exhibit 2, above referred to) which was made and executed between Norfolk Southern and Virginia Dare, a partnership, to whose rights and interest Virginia Dare, Incorporated had completely succeeded (Appendix to Appellant's Brief P. 55), and insisting further that said contract had been executed in connection with and in compensation for the rights, franchises and immunities conveyed and surrendered by Virginia Dare to Norfolk Southern under Defendant's Exhibit 4 above referred to.

In this action also, Virginia Dare counterclaimed for damages suffered by it in consequence of Norfolk Southern's repudiation and breach of this contract to furnish terminal, pick-up and delivery services for two trips a week for the remainder of the term and for the extension thereof provided in this contract.

In the hearing in the District Court, the Trial Judge peremptorily instructed the Jury against Norfolk Southern's right to recover on quantum meruit, upon the ground that the services had been rendered under the written contract with manifestly no requirement or expectation of additional compensation and no recovery on quantum meruit could therefore be sustained. Further, the Trial Judge submitted to the Jury the questions of breach and damage to Virginia Dare which were raised by its counterclaim and the Jury assessed these damages at Sixty Thousand Dollars ($60,000.00). Judgment was entered accordingly. Norfolk Southern appealed from this Judgment to the Circuit Court of Appeals, Fourth Circuit, and, among other things, assigned as error the refusal by the Trial Judge to receive in evidence certain letters (Appendix to Appellant's Brief, pages 93-102) and certain testimony (Appendix to Appellant's Brief, pages 139-146 and 147-156), which were offered by Norfolk Southern

and which Norfolk Southern contended tended to show (a) an intention of the parties that Virginia Dare was limited to operating only two days a week instead of six days a week as it had previously done, and that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business and the revenues to be divided at the end of the month on a one-third—two-thirds basis, and (b) that the written instrument (Defendant's Exhibit 2) did not contain the entire agreement between the parties, and particularly did not contain an illegal agreement of the character just mentioned.

This testimony was excluded by the Trial Judge because, among other reasons, (1) the language of Exhibit 2 was not ambiguous but perfectly clear in preserving to Virginia Dare the right to run additional schedules if and when it desired so to do, and conversely, placed no slightest limitation upon the number of schedules which Virginia Dare might run; (2) Defendant's Exhibit 2 contained also repeated provision against implication of any illegal obligation or requirement and against the indulgence of any construction contrary to law or public regulation and thus also emphatically negatived the possibility either of ambiguity or of illegal obligation arising through implication or otherwise, and (3) the testimony offered was of parol proof, which was in direct contradiction of the plain and clear terms of the writing, which proof is never admissable to contradict a writing.

The Circuit Court of Appeals ruled that this tendered testimony should have been admitted. Further, the Circuit Court of Appeals, instead of directing a new trial on the counterclaim with its opportunity to Virginia Dare to contradict or explain the tendered testimony and permitting the Jury to pass upon this conflict as in ordinary and accepted procedure, proceeded itself to accept the tendered testimony and more particularly the construction placed upon it by Norfolk South-

ern, as true, final and conclusive and upon the basis of this testimony proceeded to declare the contract as illegal, remanded the cause to the District Court with directions to enter final judgment against Virginia Dare on its counterclaim, leaving Norfolk Southern in enjoyment of all the property and rights which it acquired under the arrangement and nullifying only the conpensatory provisions for Virginia Dare.

This Petition is filed to obtain review of this ruling and of the procedure directed by the Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question and particularly the procedure directed by the Circuit Court of Appeals, because of the provision of 28 U. S. C. A. 347 (a) (Judicial Code, 240) and because said ruling and procedure directed by the Circuit Court of Appeals not only materially affected but definitely controlled the determination of said appeal and of said cause and constituted a final determination of disputed facts without the intervention of a Jury, upon which facts the validity of the contract was adjudicated.

Under usual and normal procedure at the most, a new trial would have been directed on which Virginia Dare would have been afforded opportunity to reply to this tendered testimony and the Jury left to determine, upon this basis and upon the basis of contradictory evidence already in the record (Appendix to Appellant's Brief, Page 106 especially), whether there was in fact an additional agreement of a character so illegal as to vitiate the entire contract. Instead of following this usual and normal procedure, the Circuit Court of Appeals, in its opinion delivered January 7, 1947, which appears in the record, accepted as a fact what the Norfolk Southern insisted that the proffered testimony tended to show; namely, that there was an additional agreement limiting Virginia Dare to two round trip schedules a week and

providing for the division of revenues between Norfolk Southern and Virginia Dare on a two-thirds—one-third basis. Virginia Dare was thus afforded no opportunity to reply to this tendered testimony since it was excluded by the Trial Judge in the District Court and further the suggestion that there was agreement to make two-thirds—one-third division of revenues is expressly negatived by the testimony of the witness Lennon on page 106 of Appendix to Appellant's Brief in the Circuit Court of Appeals, where it will be found that Lennon testified that the division was made on the basis of the shipper's designation of the transportation company which he desired to utilize. It is contended that the Supreme Court has jurisdiction to review such decision and procedure under and because of the provisions of the statute above cited.

For the above reasons, it is maintained that a substantial question is presented to this Court for decision. Decisions believed to sustain the reviewing jurisdiction here contended for are set forth in the supporting brief attached hereto.

QUESTIONS PRESENTED

The questions herein presented are:

(1) Was the trial Court in error in excluding said evidence?

(2) Was the Circuit Court of Appeals in error in thus departing from the accepted and usual course of judicial proceedings by accepting as final and determinative this tendered evidence and Norfolk Southern's interpretation thereof and, on the basis thereof, adjudicating the invalidity of the contract instead of directing a new trial as is usual, particularly in view of contradictory evidence already appearing in the record and Virginia Dare's demand for a jury trial?

(3) Was the contract invalid even upon this basis?

Reasons Relied on for the Allowance of the Writ

(1) The testimony offered and ruled competent by the Circuit Court of Appeals, both letters and oral evidence, tends not to clarify but to contradict. It does not explain what the contract says but (as interpreted by Norfolk Southern) negates the provisions thereof. This reason will be amplified in the supporting brief attached hereto.

(2) The decision of said Circuit Court of Appeals, by remanding the cause for final judgment on the counterclaim, instead of sending it back for a new trial, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In fact it deprives Petitioner of its right and demand for a Jury trial and substitutes therefor the finding by the Circuit Court of Appeals. This reason will be amplified in the supporting brief attached hereto.

(3) The decision of said Circuit Court of Appeals as to the validity of the Contract is a decision of a federal question in a way probably in conflict with applicable decisions of this Court. This reason will be amplified in the supporting brief attached hereto.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fourth Circuit had in the case numbered and entitled on its docket, No. 5527, Norfolk Southern Bus Corporation, Appellant, vs. Virginia Dare Transportation Company, Incorporated, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United

States Circuit Court of Appeals, Fourth Circuit, be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 4th day of April, 1947.

W. R. ASHBURN,
Norfolk, Virginia;
J. C. B. EHRINGHAUS,
Raleigh, North Carolina;
Counsel for Petitioners.

Exhibit No. 8

KNOW ALL MEN BY THESE PRESENTS, that

WHEREAS, on and as of September 12, 1936, Norfolk Southern Bus Corporation entered into a contract with R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, partners trading as the Virginia Dare Transportation Company, by which Virginia Dare Transportation Company agreed and contracted to sell and transfer unto the Norfolk Southern Bus Corporation certain franchises, certificates and rights to operate as a common carrier of commodities and property between Norfolk, Virginia and Elizabeth City, North Carolina, via Sligo, upon the terms and conditions in said contract set out, among others that the said contract between the parties and the right to transfer said certificates and rights of operation should be approved by the Interstate Commerce Commission and the State Corporation of Virginia and the Utilities Commission of North Carolina, all as set out in said contract; and,

WHEREAS, on and as of September 14, 1936, Norfolk Southern Bus Corporation made application to the Interstate Commerce Commission for authority to purchase and operate the certificates and rights of the Virginia Dare Transportation Company to operate between Norfolk, Virginia and Elizabeth City, North Carolina, upon the terms and conditions in said contract set out; and,

WHEREAS, on and as of August 3, 1938, the Interstate Commerce Commission entered an order on said application, which had been duly heard by the Interstate Commerce Commission, and was carried on its docket as No. BMC-F-111, which order is referred to and made part hereof; and,

WHEREAS, on and as of June 22, 1937, in Finance Docket No. MC-37015, a certificate of public convenience and necessity was issued to John Habit and Joe Habit, a partnership doing business as Habit Brothers Freight Line,

to operate as a common carrier by motor vehicles of commodities between Beaufort, North Carolina and Norfolk, Virginia, as set out in said certificate, No. MC-37015, which is referred to as a part hereof; and,

WHEREAS, by authority and under the approval of the Interstate Commerce Commission, the rights, privileges and franchises granted unto John Habit and Joe Habit, co-partners trading as the Habit Brothers Freight Line, has been assigned and is now held by the Virginia Carolina Transportation Company, a corporation of the State of North Carolina; and,

WHEREAS, on and as of August 1, 1938, John Habit and Joe Habit, as co-partners trading as the Habit Brothers Freight Line, granted unto the Virginia Dare Transportation Company, a co-partnership consisting of R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, the right and privilege during a period of ninety (90) days from said date to purchase and have transferred to it, subject to the approval of the Interstate Commerce Commission, the State Corporation Commission of Virginia, and the Utilities Commission of North Carolina, all of the rights and privileges the said Joe Habit and John Habit held under the said certificate No. MC-37015; and,

WHEREAS, the said John Habit and Joe Habit, trading as Habit Brothers Freight Line, after the expiration of the said ninety (90) days, claiming that the terms of the option had not been complied with, declined to transfer such certificate and the rights thereunder and therein set out unto the Virginia Dare Transportation Company, and thereafter transferred and conveyed said rights and privileges to the Virginia Carolina Transportation Company, a corporation created under the laws of the State of North Carolina, and thereafter the Virginia Dare Transportation Company, co-partnership as aforesaid, instituted a suit in the Superior

Court of Dare County, North Carolina against John Habit and Joe Habit, co-partners trading as Habit Brothers Freight Line, and the Virginia Carolina Transportation Company, claiming and demanding specific performance of the contract set out in said option of August 1, 1938, which said suit is now pending in the said Superior Court of Dare County; and,

WHEREAS, on or about the 25th day of November, 1939, Norfolk Southern Bus Corporation made application to the Interstate Commerce Commission for authority to acquire a part of the franchises and permits issued to John Habit and Joe Habit, a partnership doing business as Habit Brothers Freight Line, and to operate as a common carrier by motor vehicle of commodities over that part of the route set out in certificate No. MC-37015, as set out and described in the contract between H. C. Goodwin, Jr., and W. S. Privott, Jr., and Norfolk Southern Bus Corporation, bearing date October 30, 1939, all as set out in application filed by the Norfolk Southern Bus Corporation with Interstate Commerce Commission, No. BMC-F-1093, which application is now pending; and,

WHEREAS, all of the parties in interest in said matters and things hereinabove set out, and parties to said contracts and applications have agreed that the best interest of all parties will be served by a compromise settlement of all the matters in said contracts and applications set out, and that by such compromise and settlement the interest of the public can best be served by the establishment, building up, creating and operating a proper efficient system of transportation of property between Norfolk and Beaufort, North Carolina, as in the certificates of public convenience and necessity and rights under the Grandfather Clause of the Interstate Commerce Act set out, and to that end have agreed, and do mutually covenant to and with each other as follows: (1) That the suit now pending in the Superior Court of

Dare County, wherein R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, co-partners trading as the Virginia Dare Transportation Company are plaintiffs, against John Habit and Joe Habit, co-partners trading as Habit Brothers Freight Line, and Virginia Carolina Transportation Company, defendants, seeking specific performance of the contract or option given by Habit Brothers Freight Line to the Virginia Dare Transportation Company on and as of August 1, 1938, and to recover damages for failure to comply therewith, will, subject to the approval of the Judge of said Court, be by consent of the parties thereto continued at the next term of the said Court, which will convene for the trial of causes on Monday, May 27, 1940, until the next term of the Superior Court for said County, and will not be tried or heard and no action taken in reference thereto, pending the action by the Interstate Commerce Commission, the Utilities Commission of North Carolina and the State Corporation Commission of Virginia upon the application or applications of the Norfolk Southern Bus Corporation, as hereinafter set out.

(2) Norfolk Southern Bus Corporation will, as vigorously and actively as possible, prosecute its application now pending before the Interstate Commerce Commission, No. MC-F-1093, to purchase a portion of the rights, privileges and franchises to operate as a common carrier by motor vehicle between Norfolk, Virginia, and New Bern, North Carolina, with off-route rights, and the right to transport commodities generally, as set out in the certificate issued to John and Joe Habit, a partnership, trading as Habit Brothers Freight Line, in Certificate MC 37015, which said rights, franchises and privileges are now vested in the Virginia Carolina Company, the said Virginia Carolina Company retaining for its own use, free and clear of any claims of Norfolk Southern Bus Corporation, that part of the franchises and rights set out in said Certificate No. MC 37015, between Edenton, N. C. and Beaufort, N. C., via Windsor, Williamston, Wash-

ington, Greenville, Kinston, New Bern, and thence down to Beaufort, and returning over the same route.

It is agreed and understood that the Virginia Dare Transportation Company, a co-partnership, and its members, the Habit Brothers Freight Line, a co-partnership, and its members, and Virginia Carolina Transportation Company, will all unite with Norfolk Southern Bus Corporation in requesting the Interstate Commerce Commission to grant unto Norfolk Southern Bus Corporation its application for the right to purchase part of the Habit Brothers Freight Line certificate as set out in the application filed in MC-F-1093, upon the terms and conditions set out in the contract of Norfolk Southern Bus Corporation as purchaser, and W. S. Privott, Jr. and H. C. Goodwin, Jr., as Vendors, holding a majority of the stock of Virginia Carolina Transportation Company, all as set out in the said contract of October 30, 1939.

(3) All of the said parties, to-wit: Norfolk Southern Bus Corporation, Virginia Carolina Transportation Company, Virginia Dare Transportation Company, a co-partnership, and its members, will unite in requesting the State Corporation Commission of Virginia to give its approval to such purchase, and will unite in request to the Public Utilities Commission of North Carolina to give its consent to such purchase.

(4) Upon the approval of the contract of purchase of a portion of the franchises of Habit Brothers Freight Line now held by Virginia Carolina Transportation Company, as set out in the aforesaid contract between Norfolk Southern Bus Corporation and W. S. Privott, Jr. and H. C. Goodwin, Jr., dated October 30, 1939, vesting in Norfolk Southern Bus Corporation the right to purchase and have issued to it a certificate, or certificates, to operate as a motor carrier of commodities generally such as are usually transported by motor vehicles, between Norfolk, Va., and New Bern, N. C., by way of Sligo, Elizabeth City, Edenton, Albemarle Sound

Bridge, Plymouth, Washington and New Bern, and also between Elizabeth City and Norfolk, by way of Deep Creek, Norfolk Southern Bus Corporation will pay to Virginia Carolina Transportation Company the contract price as set out in its said contract for the purchase of said rights. The Virginia Dare Transportation Company and its co-partners, and Norfolk Southern Bus Corporation will execute a contract, or contracts, mutually releasing each other from all obligations or liability under the contract of September 12, 1936, whereby Norfolk Southern Bus Corporation agreed to purchase, under certain conditions, certain rights of the Virginia Dare Transportation Company to transport commodities between Norfolk, Va. and Elizabeth City, N. C., by way of Sligo, so that there will be no obligation on the part of either of said parties to carry out said contract, or to recover to the other any damages on account of the failure so to do, and the Virginia Dare Transportation Company will be free to continue to hold, use and operate on and over its said franchise routes from Norfolk to Manteo, N. C., and from Norfolk to Elizabeth City, N. C., by way of Sligo.

The Virginia Dare Transportation Company and its co-partners, will each and all, severally and jointly, cause to be dismissed the suit now pending in the Superior Court of Dare County, N. C., against John and Joe Habit, trading as the Habit Brothers Freight Line, and the Virginia Carolina Transportation Company, wherein the Virginia Dare Transportation Company is asking specific performance of the contract of August 1, 1938, hereinbefore referred to, and the Virginia Dare Transportation Company and its co-partners, and John and Joe Habit, trading as Habit Brothers Freight Line, and Virginia Carolina Transportation Company will mutually release each other from any and all claims, liabilities and demands, growing out of the said contract option of

August 1, 1938, releasing each other from any and all damages or claims of any sort, kind or description, on account of the execution of said option contract of August 1, 1938, and failure of either of said parties to carry out the terms of said contract, or to comply therewith in any way whatsoever. Upon said suit being dismissed and the said release being executed as to the option contract of August 1, 1938, and the contract between Norfolk Southern Bus Corporation and Virginia Dare Transportation Company of September 12, 1936, Norfolk Southern Bus Corporation will pay unto the Virginia Dare Transportation Company the sum of $5,000.00 in consideration of the execution of said releases and dismissal of said suit. Five Hundred ($500.00) Dollars of the said sum of $5,000.00 is presently to be paid as a part of the consideration of the execution of this contract and agreement. The remaining $4,500.00, part of the said $5,000.00, to be paid by Norfolk Southern Bus Corporation to the Virginia Dare Transportation Company, will be paid $3,000.00 in cash within thirty (30) days after the dismissal of said litigation, and the execution of the said releases, and $1,500.00 thereafter to be evidenced by notes of Norfolk Southern Bus Corporation to be paid at such time and in such manner as Norfolk Southern Bus Corporation and Virginia Dare Transportation Company may agree upon.

(5) Upon the granting of authority to Norfolk Southern Bus Corporation to purchase that part of the rights of the Virginia Carolina Transportation Company originally issued to John and Joe Habit, trading as Habit Brothers Freight Line, giving it the right to operate as a common carrier by motor vehicle in the transportation of commodities and property generally, with off-route rights from Norfolk via Deep Creek, and also Sligo to Elizabeth City, Edenton, thence over the Albemarle Sound Bridge to Columbia, N. C., to Plymouth, N. C., and thence to Washington and New Bern, as set out in said application, by the Interstate

Commerce Commission, the State Corporation Commission of Virginia and the Public Utilities Commission of North Carolina Norfolk Southern Bus Corporation will pay unto Virginia Carolina Transportation Company, in the manner set out in the said contract of October 30, 1939, attached to and forming a part of the application of Norfolk Southern Bus Corporation to buy, the purchase price of said rights, as in said contract set out.

(6) Norfolk Southern Bus Corporation and Virginia Dare Transportation Company will, in the manner provided by law, provide for the establishment of through routes and joint rates over their franchise routes between Norfolk, Va., and Manteo, N. C., Norfolk, Virginia, and Elizabeth City, N. C., and points south of New Bern, N. C., and also to such other points as may be agreed upon and reached and served by the respective corporations; the terms and conditions of such through routes and joint rates and interchange of traffic and the division of rates to be in accordance with the provisions of law.

IN WITNESS WHEREOF, the parties hereto, viz: R. BRUCE ETHERIDGE, R. B. LENNON and GUY H. LENNON, co-partners, trading as Virginia Dare Transportation Company; JOE HABIT and JOHN HABIT, co-partners, trading as the HABIT BROTHERS FREIGHT LINE; W. S. PRIVOTT, JR., and H. C. GOODWIN, JR., holders of the majority of the capital stock of the Virginia Carolina Transportation Company; the VIRGINIA CAROLINA TRANSPORTATION COMPANY, a corporation of North Carolina, and NORFOLK SOUTHERN BUS CORPORATION, a corporation of Virginia, have caused these presents to be executed, the said individuals under their hands and seals, and the said VIRGINIA CAROLINA TRANSPORTATION COMPANY by W. S. Privott, Jr., its President, and NORFOLK SOUTHERN BUS

CORPORATION by L. B. Wickersham, its Vice-President and General Manager, all this the 24 day of May, 1940.

R. BRUCE ETHERIDGE (SEAL)
R. B. LENNON (SEAL)
GUY H. LENNON (SEAL)

Co-partners, trading as Virginia Dare Transportation Company.

---------- (SEAL)
---------- (SEAL)

Co-partners, trading as the Habit Brothers Freight Line.

W. S. PRIVOTT, JR. (SEAL)
H. C. GOODWIN, JR. (SEAL)

VIRGINIA CAROLINA TRANSPORTATION COMPANY,
By: W. S. Privott, Jr.
President.

NORFOLK SOUTHERN BUS CORPORATION,
By: L. B. Wickersham
Vice-President and General Manager.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NO———

VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,

Petitioner and Appellee below

vs.

NORFOLK SOUTHERN BUS CORPORATION,

Respondent and Appellant below

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF COURT BELOW

The opinion in the Circuit Court of Appeals, Fourth Circuit was delivered January 7, 1947, and is not yet reported.

JURISDICTION

1. The date of decision to be reviewed was January 7, 1947.

2. The Statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. A. 347 (a) Judicial Code Sec. 240, Supreme Court Rule 38 (5) (b).

3. The decision of the Circuit Court of Appeals, in itself accepting said testimony and finally disposing of the case therein, constituted a substantial departure from the accepted and usual course of judicial procedure and was of such character as to call for an exercise of this Court's power of supervision. It preempted to the Circuit Court of Appeals the function of a Jury and substituted a finding by the Court for

a finding by the Jury. It violated the Constitutional provision for a Jury trial (VIIth Amendment).

It further was probably in conflict with applicable decisions of this Court on a federal question. As disclosed by the Answer Virginia Dare had demanded a Jury trial herein.

4. Among others, the following cases are believed to sustain said jurisdiction:

Clone v *West Va. Pulp & Paper Co.*, 91 L. Ed. Adv. Sheet No. 9, p. 683 (decided March 3, 1947).

Burns Mortgage Company v *Fried*, 292 U. S. 487

Reynolds v *United States*, 292 U. S. 443, 54 S. Ct. 800, 78 L. Ed. 1353.

Southern Railway Company v *Walters*, 284 U. S. 190, 53 S. Ct. 58, 76 L. Ed. 239.

McCandless v *United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

Stringfellow v *Atlantic Coast Line*, 290 U. S. 322, 54 S. Ct. 175, 78 L. Ed. 339.

Ormsby v *Chase*, 290 U. S. 387, 54 S. Ct. 211, 78 L. Ed. 378, 92 A. L. R. 1499.

Dimick v *Schiedt*, 293 U. S. 474, 79 L. Ed. 603.

Statement of the Case

The case in broad outline has already been stated in the preceding Petition for Writ of Certiorari, page 1, and the statement there made is hereby adopted and made a part of this Brief.

The Court in its opinion first holds that the tendered testimony was competent and should have been admitted on the trial below. It then proceeds itself to accept this testimony as establishing that an additional agreement limiting the schedules and prorating the receipts was in fact made, though such an agreement contradicts flatly the provisions of the written contract which contained no limitation upon schedules and no provision for any such division of the receipts of

the two companies. The Court then, upon the basis of its own acceptance of this testimony as final and conclusive, proceeds to adjudicate the contract (Exhibit 2, Appellant's Brief in Court below page 6 and Appendix to Appellant's Brief pages 210-215) as illegal and void. The Circuit Court of Appeals then remands the case for final judgment against the counterclaim.

Specification of Errors

Petitioner contends that the Circuit Court of Appeals erred:

A—In holding said proffered evidence was admissable.

And, without regard to the correctness of this ruling on admissability, that the Court erred,

B—In preempting the functions of a Jury (demanded by Virginia Dare in its Answer) by accepting this proffered testimony and more particularly the Norfolk Southern's construction of it, as final and conclusive as to the alleged additional and unlawful agreement.

C—In denying to Virginia Dare the chance, upon a new trial, to reply to this evidence, which had been excluded in the trial in the District Court.

D—In ignoring the contrary evidence already in the Record.

E—In declaring the contract sued upon by Virginia Dare illegal and invalid on the basis of this rejected testimony, instead of having it submitted to a Jury in a new trial,

Several objections to the Court's declaration of invalidity, and several probably conflicting decisions, will be set out in the argument on this point.

Argument

POINT A

The testimony offered by Norfolk Southern and excluded by the trial Court consisting both of letters and testimony of the witnesses Bragg and Nelms (Appendix to Appellant's

Brief, pages 93-102, 139-146 and 147-156) was rightly excluded by the Trial Judge.

(1) Because there was and is no ambiguity in the writing (Exhibit 2, page 6, Appellant's Brief). This language is plain and free from doubt or uncertainty. A reading of the Exhibit, and particularly of sections 2 and 3 discloses no limitation upon the number of schedules but a clear safeguarding of Virginia Dare's right to run more than two schedules if and when it so desired. Likewise, there was no slightest provision of pooling and division of revenues, except upon a basis which is manifestly legal, clearly set forth in this writing and conforming with the comparative distances hauled by the two lines signing this contract.

(2) Because the tendered testimony instead of clarifying the language of Exhibit 2 flatly contradicted it as this testimony is interpreted by Norfolk Southern and the Circuit Court of Appeals;

(3) Because the alleged contradiction came in the form of parol utterances made long after the date of the writing;

A reading of the opinion of the Circuit Court of Appeals discloses that this Court begins its discussion by stating the contention of the two parties and ignores the fact that Norfolk Southern's contention of illegality in the contract had no slightest basis or foundation in the writing itself and depended for its existence upon the introduction of testimony outside of the writing and flatly contradicting it. So the assumption in the opinion of the Circuit Court of Appeals that there was a contradiction in the writing or room for doubt as to its meaning or ambiguity in its provisions is an assumption without slightest justification and founded only on a contention made by Norfolk Southern upon the basis of evidence outside of and contradicting the contract as memorialized by the writing under consideration. The Circuit Court of Appeals thereupon proceeds to admit this contradictory

testimony to clarify a supposed but non-existent ambiguity or prove an additional and contradicting agreement.

The writing (Exhibit 2) was and is plain. The consideration moving from Virginia Dare to Norfolk Southern (namely, the Habit two-way franchise, release from requirement to pay $14,000.00 cash to Virginia Dare for a franchise between Norfolk and Elizabeth City as provided in the superceded contract, the release from obligation to provide free of cost to Virginia Dare terminal facilities at Sligo (approved by I. C. C. when this tentative contract was submitted for its consideration and approval) were all paid in advance and no further payment for terminal pick-up and delivery services were required for two trips. It was, however, plainly provided that Virginia Dare would have to pay for these for or in connection with any additional trips it might make. Virginia Dare under the contract paid no more for two trips whether it ran two or two hundred schedules, and conversely, it was relieved of no charge by not running more than two trips since it incurred no additional expense, it being considered by the parties that Virginia Dare had paid for this much service in advance.

But without regard to the correctness of the trial Court's ruling on the admissibility of this testimony, the Petitioner submits that the Circuit Court of Appeals erred

Point B

In preempting the functions of a Jury (demanded by Virginia Dare in its answer) by its acceptance of the proffered testimony, and more particularly, Norfolk Southern's construction of this testimony, as final and conclusive as to the existence of an additional agreement, the Court erred.

Virginia Dare having, in its answer, demanded its right to trial by Jury, not even the Circuit Court of Appeals, respectfully speaking, could deprive it of this right guaranteed

by the VIIth Amendment to the Constitution. Any refusal or declination to preserve this right constitutes a serious and substantial departure from ordinarily accepted and usual procedure.

As stated by the court in *Dimick* v *Schiedt,* 293, U. S. 474, 79 L. Ed. 603, 611:

> ". . . any seeming curtailment of the right to a Jury trial should be scrutinized with utmost care."

The procedure in the Circuit Court falls clearly within the condemnation of the language in the *Dimick* case to the further effect that

> ". . . how can it be held . . . that that Court . . . may . . . bring the constitutional right of the Plaintiff to a Jury trial to an end in respect of a matter of fact which no Jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the Plaintiff to forego his constitutional right to the verdict of a Jury . . ."

Point C

There was error in the Court's denying to Virginia Dare the chance upon a new trial to reply to this evidence which had been excluded in the trial in the District Court.

This tendered testimony consisted of letters written long after the execution of the writing, Exhibit 2, and of testimony as to the division of freight and revenue. Since the testimony was excluded at the trial—and we think correctly—there was no need then for Virginia Dare to offer evidence by way of explanation or reply. If, however, the testimony is to be admitted, then by every rule of accepted procedure, Virginia Dare is entitled to an opportunity to offer evidence by way of either explanation or reply. *McCandless* v. *U. S.,* 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

Such is a right which by all accepted and usual procedure belongs to Virginia Dare, which is taken from it by the procedure directed by the Circuit Court of Appeals.

POINT D

In ignoring the contrary evidence already appearing in the record and itself passing upon the existence of this additional agreement, the Circuit Court of Appeals again offended against the requirement that it should observe accepted, usual and ordinary procedure. Compare *Southern Railway Co.* v *Walters,* 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

It cannot be denied that the record contains and contained already certain contradictory testimony.

(a) As to any agreement to divide freight revenues, we refer to the positive statement of the witness Lennon (page 106 of Appendix to Appellant's Brief) that freights were divided between the two lines according to the shipper's "choice" of the line over which he desired the freight to move or in the words of the witness "as consigned by the shipper on the bills of lading."

(b) As to the suggestion that freight rates were increased by this arrangement or by anything done under Exhibit 2, it appears by reference to the testimony which was offered and excluded (1) that the rates were fixed by law through the Interstate Commerce Commission (See Appendix to Appellant's Brief, pages 152-3) and could not therefore be changed by Exhibit 2 or any other agreement and (2) that the rates were not raised under this agreement or because of it, but were made equal and were equal at the time the agreement went into effect (See Appendix to Appellant's Brief, Page 154), and further, that the only effort to raise these rates thereafter was apparently joined in by the Norfolk Southern, but Virginia Dare refused to participate in this effort (See pages 154-5, Appendix to Appellant's Brief). All this was a part of the testimony tendered and excluded. It is difficult to understand, therefore, how the Court obtained such an impression as it certainly voiced an exactly contrary conclusion to what the record discloses.

Notwithstanding this contradictory testimony already in the record the Circuit Court of Appeals in its opinion proceeded to assume and accept, as established facts, Norfolk Southern's contention, without any evidence to support it, that through the contract under consideration (Exhibit 2) shipments and freights were arbitrarily divided on a one-third and two-thirds basis, that rates were raised in consequence of the signing of this Exhibit 2, and that schedules were limited to two for Virginia Dare, when on the face of the contract, Virginia Dare was at all times free and entitled to run twenty or two hundred schedules a week if it wished or was required so to do.

It must be borne in mind that schedules as well as rates are required to be filed and approved by the I. C. C. (See page 152-3, Appendix to Apellant's Brief); that it is not a question of how many schedules were actually run by Virginia Dare but whether the right to run more was actually limited by this contract; that Norfolk Southern, by its purchase from Virginia Dare, acquired the Habit franchise and the right thereunder to run schedules as it pleased between Norfolk and Elizabeth City and lastly, that there were "six or more" carriers at that time between Norfolk and Elizabeth City (See Appendix to Appellant's Brief, page 152). Certainly, there was neither actual nor potential monopoly here.

POINT E

In declaring the contract sued upon by Virginia Dare (Exhibit 2) illegal and invalid on the basis of the Circuit Court of Appeals' acceptance of Norfolk Southern's interpretation of the rejected testimony instead of submitting the question to a Jury the court again departed from accepted procedure, and its opinion is in probable conflict with other applicable decisions of this Court.

In *McCandless* v *United States,* 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205, there was before the Court a condem-

nation proceeding in which there was tendered by the Petitioners evidence tending to establish the most profitable use to which the land in question could probably be put in the reasonably near future and the availability of certain improvements in the nature of water supply. The District Court excluded the testimony upon Respondent's suggestion as to its immateriality. The Circuit Court of Appeals, 9th Circuit, held that the evidence was improperly excluded but that the error was not prejudicial and therefore affirmed the District Court. Mr. Justice Southerland, expressing the opinion of the Supreme Court in reversing and remanding the cause to the Trial Court, agreed with the Circuit Court that the exclusion of the testimony was error, but on the contrary reversed the Circuit Court on the grounds that Petitioner should have been given opportunity to make his offer of testimony more specific and to give evidence supplementing the issue of value. In the case at bar, no opportunity to explain or contradict the testimony offered by Norfolk Southern has been afforded Virginia Dare and in fact in the light of its rejection in the lower Court, counsel were not required to go forward with evidence tending to contradict such implication as may arise therefrom.

Compare also, *Shepard* v *United States,* 290 U. S. 96, 54 S. Ct. 22, 28 L. Ed. 196, in which a reversal was ordered for prejudicial error in the admission of incompetent hearsay evidence attempted to be supported on untenable grounds in the majority opinion of the Circuit Court of Appeals.

See also *Ormsby* v *Chase,* 290 U. S. 387, 54 S. Ct. 211, 78 L. Ed. 378, 92 A. L. R. 1499, in which there was an erroneous application of rules of conflicts of laws.

Also see *Clone* v *West Virginia Pulp & P. Co.* reported in Vol. 91 Adv. Sheets, L. Ed. Page 685. (Decided March 3, 1947) wherein a substantial question of Federal Procedure was presented.

(1.) *Test of Illegality*

While Petitioner again denies that anything it did was unlawful or was done in an illegal manner, the following authorities should be cited:

> "The rule has been stated to be that if an agreement can by its terms be performed lawfully, it will be treated as legal even if performed in an illegal manner." 12 Am. Jur. 647.
>
> "To invalidate the contract, the illegality must be inherent and not merely collateral. The contract is to be judged by its character and not by what the parties may do, or attempt to do, with the fruits of it, and the courts may look to the substance and not to the mere form of the transaction. If the contract itself discloses no illegality and may be performed in a legal manner, it is not rendered unenforceable by the fact that it may also be, or is actually, performed in an illegal manner." 17 C. J. S. 545.
>
> "The test to be applied is not what is actually done but that which may or might be done under the terms of the contract." 17 C. J. S. 564.
>
> "The doing of the act in violation of statute will not necessarily vitiate a contract which is connected with it only incidentally because it relates to property affected in some degree by the statute." 17 C. J. S. 557.
>
> "This contract is to be decided not by what unlawful means may have been used to bring about a just and honest result, but whether by its terms it necessarily implies the use of unlawful means in its accomplishment." *Stancell* v *Roach,* 147 Penn., 27 A. L. R. 143.
>
> See also *Arlington Hotel* v *Ewing,* 124 Tenn. 550. *Old Dominions Transportation Company* v *Hamilton,* 131 S. E. 850, and 853.

Smythe Brothers et al v *Boresford,* 128 Va. 137, 104 S. E. 371.

Macco Construction Company v *Farr et al* (see C. C. A. 9th) 137 F. 2d, 52.

(2.) *Participation in or Responsibility for Illegality*

And certainly, where as in this case, the party complaining (Norfolk Southern) itself prepared the instrument under attack and enjoyed and still enjoys all of the benefits it got under the arrangement and acted under this arrangement without questioning its validity for four and one-half years, and the principal benefits received by the other party (Virginia Dare) were the provision of this terminal pick-up and delivery service for two trips a week, it is not in law or equity, in a position to raise such a question at this time and avoid its own obligations under the contract, while still enjoying its fruits, by suggesting an illegality in the arrangement.

Macco Construction Company v *Farr et al,* Supra.

In this case the Court well said:

> "It is always the position of the law to avoid absurdities, injustices and hardships. You may be sure it never was the Legislative intention that beneficiaries of the violation, particularly if they were themselves instrumental in bringing about the breach, should thus be relieved from the just obligation of the contract."

(3.) *Conduct as Distinguished from Contract*

On the question of whether under a mistaken interpretation of what an entirely legal contract provides, the parties thereto conduct themselves in an illegal fashion, the attention of the Court is especially directed to *Old Dominion Transportation Company* v *Hamilton,* 131 S. E. 850.

In this case, the Supreme Court of Appeals of Virginia made a clear distinction between the *illegality of the conduct*

of the parties and *the nature of the contract itself* and quoted with approval 2 Page on Contracts, Section 663 as follows:

> "The illegality or validity of a contract is to be determined by its tendancy as the parties make it and not by actual *result* as the parties *perform* it. If it can by its terms be performed lawfully, it will be treated as legal, even if it is actually performed in an illegal manner, or even if one of the parties intends illegal performance; and still more, if illegal performance is merely possible." (Italics for emphasis supplied.)

In Williston on Contracts, Section 1779, it is said:

> "It was early decided that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. This is the simplest form of the problem of partly illegal contracts. *If legal consideration has actually been given and a unilateral contract formed,* or if the promises are under seal and binding without consideration, the *rule thus early established has never been question.*" (Italics supplied.)
>
> Neither does a plea of illegality justify a breach. *Northwestern Consol Milling Company* v *William Campbell and Sons,* 177 F. 786, 788.

A probably conflicting decision of this Court is *Small Company* v *Lamborn Company,* 267 U. S. 246.

(4.) *Doctrine of unreasonable restraint*

As to the doctrine of unreasonable as distinguished from reasonable restraints, see *Standard Oil Company* v *United States,* 221 U. S. 1 and other cases cited on page 26 of Appellees Brief in the Circuit Court of Appeals.

(5.) *Doctrine of Seperability*

Further, it is suggested respectfully that even if the contract here under consideration had contained a clause of the

character suggested in the tendered testimony, such would not and could not affect the perfectly legal provisions of that contract which are set up in paragraphs 3, 4 and 5, regarding the establishment of joint terminals, etc., and which constitute the basis of Virginia Dare's counterclaim herein. General authorities and probably conflicting decisions of this Court are:

12 Am. Jur. 739.

McCullough v *Virginia*, 172 U. S. 102.

Chicago, etc. Railroad Company v *Pullman Southern Car Company*, 139 U. S. 79.

U. S. v *Bradley*, 10 Pet. 343.

12 Am. Jur. 737.

17 C. J. S. 677.

See also other cases cited on pages 24 and 25 of Appellee's Brief in the Circuit Court of Appeals.

(6.) *No Requirement of Advance I. C. C. Approval*

A. As to terminal facilities.

Admitting the supervisory power of the I. C. C. over joint terminals, there is no requirement of advance approval as a prerequisite to validity. Terminal contracts and contracts for terminal service are normal, usual and purely managerial functions and joint terminals or joint terminal services are quite normal arrangements.

Skaggs v *Kansas City Terminal Ry. Co.*, 233 F. 837.

B. As to pick-up and delivery service.

APPLICATION OF UNIVERSAL CARTAGE COMPANY ON THE PURCHASE OF DIXIE CARTAGE COMPANY, 37 MCC 107, 110, an exact parallel.

APPLICATION OF CONSOLIDATED FREIGHT LINES, INC., 11 MCC 131-136.

APPLICATION OF MASON CITY WAREHOUSE CORP., 26 MCC 646, 647.

For the above reasons, we suggest the Petition for Certiorari should be granted.

Respectfully,

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